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Supreme Court of the United States

October Term, 1958

No. 382

O. Z. EVERS, *et al.*,

Appellants,

v.

JOHN T. DWYER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

STATEMENT AS TO JURISDICTION

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Appeal from the United States District Court for the Western District of Tennessee, Eastern Division

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and (5), files this, his statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the judgment of the District Court and should exercise such jurisdiction in this case.

Opinion Below

The opinion of the District Court has not yet been reported but a copy thereof appears as Appendix I to this statement.

Jurisdiction

The case below was brought by appellant to secure a declaratory judgment and interlocutory and permanent injunctions to restrain appellees from enforcing Sections 1704-1709, Title 65, Tennessee Code Annotated on the grounds that said statutes contravened the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Appellant invoked jurisdiction under 28 U. S. C. §§ 1331 and 1343(3) (Tr. 1) and a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284 (Tr. 24). This appeal is taken from the judgment of the three-judge court dismissing the action for lack of an actual controversy.

The final decree appealed from was made and entered on June 27, 1958 (Tr. 36). Notice of appeal was filed in the U. S. District Court for the Western District of Tennessee, Eastern Division on July 23, 1958 (Tr. 37).

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U. S. C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Brown* v. *Board of Education*, 347 U. S. 483; *Toomer* v. *Witsell*, 334 U. S. 385.

Appellant also filed a notice of appeal in the United States Court of Appeals for the Sixth Circuit (Tr. 40). This action was not taken because of any doubt that the jurisdiction of a three-judge court was properly and necessarily invoked under Title 28, U. S. C. § 2281, but rather because *Gayle* v. *Browder*, 352 U. S. 903, decided after the commencement of this action, may affect the substantiality of the federal question presented to this Court. Since the issue—whether a subsequent decision may affect the propriety of a direct appeal to this Court from a judgment

of a three-judge court whose jurisdiction was properly invoked initially—has not yet been fully clarified, appellant filed an appeal in the Court of Appeals.

Statute Involved

Sections 1704-1709, Title 65, Tennessee Code Annotated, 1955, requiring the separation of white and colored persons on street car lines operated in the state of Tennessee are not set out here because of their length, but appear in Appendix II to this statement.

Questions Presented

1. Whether Sections 1704-1709, Title 65, Tennessee Code, 1955, requiring racial segregation on street car lines operated in Tennessee are violative of the equal protection clause of the Fourteenth Amendment?

2. Whether appellant Evers, a Negro resident of Memphis, Tennessee, against whom Tennessee statutes requiring racial segregation have been enforced, may be barred from maintaining an action to declare said statutes unconstitutional and to restrain their enforcement, on the ground that this suit does not present an "actual controversy?"

Statement of the Case

On June 5, 1956 appellant, a Negro resident of the City of Memphis, Tennessee, brought this action against the Mayor and Commissioners of Memphis, the Chief of Police and two police officers of Memphis, the Memphis Street Railway Company and the operator of one of the Company's buses. Appellant sought a declaratory judgment that Title 65, Sections 1704-1709, Tennessee Code annotated, requiring segregation of white and Negro passengers on street car lines operated in the State of Tennessee,

was unconstitutional in that it offended the equal protection clause of the Fourteenth Amendment, and interlocutory and permanent injunctions restraining the enforcement of these statutes (Tr. 6, 7). The suit was brought as a class suit under Rule 23a of the Federal Rules of Civil Procedure on behalf of appellant Evers and all other Negroes similiarly situated.

In the complaint, appellant alleged that on April 26, 1956, he had boarded a bus operated by appellee railway company and had taken a seat normally reserved for white persons, that he had been ordered to move by the bus driver but refused to do so, that the driver summoned two policemen who advised appellant that he was violating state law and ordered him to move to the rear of the bus, leave the bus, or be arrested and that he elected to leave the bus (Tr. 4, 5).

All of the appellees admitted the substantial accuracy of these allegations (Tr. 10, 15, 21, 22), and on November 27, 1956, a motion for summary judgment was filed (Tr. 25).

Hearing on the merits of this cause was held before a three-judge court on January 6, 1958, nineteen months after the commencement of this action. At the hearing, counsel for appellees elicited from appellant the statements that he had used the public transportation facilities of Memphis only on the occasion described in his complaint (Tr. 117), that he owned an automobile (Tr. 117), and that he was not personally bearing the expenses of this action (Tr. 112, 118). Upon these statements, and evidence that appellant was employing a roundabout means of reaching his asserted destination (Tr. 150-153) appellees based a motion to dismiss.

On January 11, 1958, a further hearing was held to allow the intervention of the Governor and Attorney General of Tennessee. The Governor and Attorney General appeared by their attorneys, adopted all the defenses presented by the other appellees and submitted briefs in support of these defenses (Tr. 326).

On June 27, 1958, the court below entered an order dismissing the complaint on the ground that no actual controversy was presented for decision and that appellant had suffered no legal injury, basing this decision upon the facts brought forth at the January 6 hearing.

On July 23, 1958, appellant filed notice of appeal to this Court (Tr. 37) and to the Court of Appeals (Tr. 40).

The Questions Presented Are Substantial

A. The Constitutional Question.

In a series of decisions rendered since 1954, this Court has held that all forms of publicly sanctioned or enforced racial segregation are repugnant to the guarantees of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Baltimore City* v. *Dawson*, 350 U. S. 877; *Holmes* v. *Atlanta*, 350 U. S. 879; *Gayle* v. *Browder*, 352 U. S. 903. *Gayle* v. *Browder* applied this principle to public transportation, the field here involved.

But in several areas, state and local officials have sought to avoid the effect of these decisions by employing various colorable legal stratagems. In some cases these devices have delayed or nullified the enjoyment by Negro citizens of their rights to unsegregated public facilities.

In this case, it is submitted, the court below erroneously sanctioned a principle which, if sustained, will be used to further frustrate and postpone the vindication of these constitutional rights.

Appellant Evers' constitutional right to unsegregated public transportation facilities and the rights of those similarly situated can no longer be doubted. *Gayle* v. *Browder, supra.* Unless the court below was correct in concluding that appellant Evers had no standing to maintain this action, it was under obligation to enter an order vindicating the right to the use of public transportation facilities on a non-discriminatory basis.